

example, a group of long-time ITFS licensees that includes Region IV Educational Service Center, UT Television (of the University of Texas Health Science Center), George Mason University Instructional Foundation, Inc. and Humanities Instructional TV Educational Center (collectively, the “P&C ITFS Parties”) cogently argue that:

It is imperative that an expedited processing procedure be implemented. The existing window filing procedure has resulted in years of delay in making distance learning education available in many areas. Although certainly not perfect, we support the automatic grant processing of applications conditioned upon strict regulatory oversight assuring that those that employ the advanced technology are required to protect incumbents against any impermissible harmful electrical interference resulting therefrom.^{40/}

As Corporation for Public Broadcasting, Association of America’s Public Television Stations, and Public Broadcasting (collectively, “CPB/APTS/PBS”) succinctly put it “[e]very delay in ITFS station application processing also delays service to the students.”^{41/} Instructional Telecommunications Foundation, Inc. (“ITF”) recounts the significant delays it has suffered as a result of application backlogs, and concludes that “[l]ike the petitioners in this proceeding, ITF is concerned that existing ITFS processing has proven to be much too sluggish, and that the Commission will be slowed even further by complex showings involving upstream transmission, cellularization, sectorization, etc.”^{42/} The DL&A ITFS Parties state that they “are in complete sympathy with the desire of [the Petitioners] to find a way to make FCC processing of applications prompt and efficient.”^{43/} Thus, it should come as no surprise that the NIA/WCA Joint Proposal

^{40/} P&C ITFS Comments, at 6.

^{41/} CPB Comments, at 13.

^{42/} ITF Comments, at 4-5.

^{43/} DL&A ITFS Comments, at 7.

specifically calls upon the Commission to “adopt rules providing for the expedited processing and granting of applications to introduce advanced technologies on MDS and ITFS channels, provided that the rules assure incumbents protection against any impermissible harmful electrical interference that results upon the initiation of service” — *rules which the Petitioners have proposed*.^{44/}

As noted above, some of those who have yet to embrace the Petitioners’ approach express vague concerns that ITFS service could somehow be compromised.^{45/} The short answer to those concerns is that the rules proposed by the Petitioners are highly protective of all incumbent licensees. The Petitioners must reiterate what they set out in detail in their Comments — the proposed rules still require: (a) that facilities proposed for expedited processing remain within a power flux density limit at their protected service area (“PSA”) border; (b) that the applicant prepare detailed analyses demonstrating compliance with highly-protective technical rules; (c) that those interference protection analyses be included in the applications filed with the Commission and served on potentially affected licensees;^{46/} (d) that the staff review the applications and assure that all neighboring facilities have either consented to the application or have been analyzed for protection

^{44/} NIA/WCA Joint Proposal, at ¶ XI.

^{45/} See HITN Comments, at 4; Maryland Comments, at 6; CPB Comments, at 10.

^{46/} The Petitioners note with concern the suggestion advanced in a memorandum annexed to the CPB Comments which suggests that the Commission itself, and not applicants, should be required to serve copies of applications upon neighbors. See Memorandum to Ms. Lonna Thompson from Larry Miller, at 3, appended as Attachment 1 to CPB Comments. Yet, there is no explanation of why such a radical rule change is necessary, nor is there any recognition of the significant burden this would impose upon the Commission staff (which has far more important things to do) or of the delay that this would cause in application processing. Needless to say, this is an example of how some in the ITFS community advocate an increasingly paternalistic regulatory environment without any regard for the impact.

from interference; (e) that there be a 60-day period running from public notice of the acceptance of the application for the submission of petitions to deny or other formal objections prior to any automatic grant;^{47/} (f) that a 30-day period under Section 1.106 be afforded for the filing of petitions for reconsideration of any automatic grant; and (g) that the 40-day period under Section 1.117(a) remain during which the Commission on its own motion can reconsider any automatic grant.^{48/} Most importantly, as the Petitioners have stressed several times *any impermissible harmful electrical interference that does result from new operations following an automatic grant must be cured.*^{49/} Thus, even those ITFS licensees who ignore the copies of applications for proposed nearby facilities that will be served upon them, who undertake no independent review of potential interference, and who allow to pass their opportunity to file pre-grant objection with the Commission *are still completely protected from impermissible harmful electrical interference under the proposed rules!*^{50/}

^{47/} ITF has proposed that the Commission expand this petition to deny period to 90 days, albeit without any explanation of why an additional 30 days is necessary. *See* ITF Comments, at 8. The Petitioners believe, however, that CPB/APTS/PBS have the better of this argument, supporting a 60-day period for the submission of petitions to deny in order to avoid undue delay in application processing. *See* CPB Comments, at 13-14.

^{48/} *See* Petitioners Comments, at 21-22.

^{49/} *See id.* at 22-23, 29; Petitioners' PN Reply Comments, at 26-27. This requirement that any impermissible harmful electrical interference be cured should satisfy the concerns expressed by the Alliance of MDS Licensees, who argue that the Commission should either impose such a requirement or not adopt automatic grant provisions. *See* MDS Licensees Comments, at 24-25.

^{50/} In their comments, Dallas County Community College District, *et al.* proposed the adoption of an interference protection standard similar to that embodied in Section 95.861 of the Rules for protecting broadcast channel 13 from the Interactive Video and Data Service ("IVDS"). *See* Dallas Comments, at 5-6. While the proposal advanced by the Petitioners is somewhat similar to the IVDS rules, in certain respects the Petitioners' approach is more protective of ITFS than the IVDS rules are of channel 13. For example, while the IVDS rules do not require notice to potentially affected parties prior to the launch of an IVDS cell (notice can be given as late as 10 days after the activation of the cell), the rules proposed by the Petitioners provide for the publication of public

Ironically, although the experiences of ITF provide some of the most persuasive arguments for an expedited processing system and ITF supports automatic grants as a mechanism for reducing future delays,^{51/} ITF objects to the one element of the Petitioners' approach that is most essential to eliminating delays, *i.e.*, the proposal that applications filed on the same day (or in the same window) in compliance with the rules (including maintenance of the power flux density within limits at the PSA border and protection of all incumbent stations) be entitled to grant even if they propose facilities that may cause actual interference to one another.^{52/} As the Commission considers ITF's concerns, it should not forget the arguments advanced at length by the Petitioners as to how their approach will eliminate abuses, conserve staff resources and expedite the initiation of new service offerings.^{53/} Significantly, ITF has not addressed these benefits, nor has it addressed the precedent which exists for the Petitioners' approach by virtue of the Commission's rules for the licensing of

notice of any proposed MDS or ITFS booster or response station hub at least 60 days prior to the inauguration of service. Moreover, the Petitioners have indicated in their Comments that they would not oppose a requirement that licensees that are not cochannel or adjacent channel to a response station hub also be notified directly prior to the activation of that facility. *See* Petitioners Comments, at 104-105. In other respects, however, the IVDS rules are inappropriate because they are designed with respect to a broadcast service rather than a subscription service. For example, the IVDS notice rule focuses on notice to the public at large, which is appropriate for a free broadcast service, but is inappropriate for a subscription service like that offered over the MDS/ITFS channels. Here, notice to the potentially-affected licensee is the appropriate approach. *See, e.g.* 47 C.F.R. § 27.58(e)(requiring WCS licensee to notify MDS and ITFS licensees, and not the public at large, before inauguration of service).

^{51/} *See* Dallas Comments, at 6.

^{52/} *See id.* at 7-8.

^{53/} *See* Petitioners Comments, at 35-43.

MDS stations.^{54/} While the Petitioners appreciate that at first blush their proposal appears to risk significant interference, a careful review of the protections built into the proposed rules establishes that the risks are *de minimus* and within the control of the licensee. Moreover, the Petitioners believe that ITF's concerns are misplaced, as they are based upon two erroneous views of how the Petitioners' proposal would work.

First, ITF apparently holds the mistaken view that while an unmodified facility would be entitled to interference protection under the proposed rules, once a licensee proposes to change its technical configuration, its existing facility would become vulnerable to interference.^{55/} That is not the case. Under the current rules, an existing facility does not lose interference protection until a modification application is granted and the licensee certifies completion of construction of the modified station. The Petitioners have not proposed any change to that policy.^{56/} Under the Petitioners' proposal, the only protection the modified facility will be entitled from another facility proposed on the same day (or in the same window) will be an assurance that the power flux density

^{54/} See *id.* at 39-40. The comments filed by the Alliance of MDS Licensees suffer a similar flaw. While they argue that resolving mutually-exclusive applications "is the very essence of the Commission's function" (MDS Licensees Comments, at 23-24), they ignore that the Commission routinely grants applications (including applications filed by MDS BTA authorization holders) that comport with power flux density requirements at service area boundaries, even if the proposed facilities will cause actual interference to nearby stations.

^{55/} See *id.* at 8 n.4.

^{56/} To the contrary, proposed Section 21.909(h) and 74.939(g) make clear that during the pendency of an application proposing to "turn around" a channel exclusively for response station use, the applicant will be entitled to interference protection both for its existing outbound operations and for its response station hub until the application to utilize the channel(s) in issue exclusively for response stations is granted.

at the PSA border remains within limits. However, the existing facility will remain fully entitled to interference protection based on the 45 dB/0 dB D/U standard.

Second, ITF's opposition to the proposed expedited licensing system is based on a concern that "if an existing licensee requests one modification and an involuntary modification application proposes another, both could be automatically granted" although the modifications are inconsistent.^{57/} However, that scenario cannot occur. As the Petitioners made clear in their Comments in response to the *NPRM*, "[t]he Petitioners appreciate that involuntary modification applications tend to be controversial in nature and therefore suggest that the Commission exclude involuntary major modification applications from those eligible for automatic grant under the Petitioners' proposal."^{58/} Thus, ITF's concern is misplaced. Even in the highly unlikely event that the licensee of a station files a modification application at the same time that an involuntary modification application is being filed, there is no risk that inconsistent applications will automatically be granted.^{59/}

More importantly, ITF's alternative proposal — that the Commission identify all mutually exclusive applications within 150 days after the close of each filing window — presumes an ability on the part of the Commission's relatively small MDS and ITFS application processing staff to

^{57/} ITF Comments, at 8.

^{58/} Petitioners Comments, at 114 n.180.

^{59/} In the highly unlikely event such inconsistent applications are filed, the Commission would need to evaluate whether the voluntary modification application is *bona fide* and not merely a pretense to avoid an involuntary modification, and whether the objectives of the involuntary modification application can be achieved in a manner consistent with any legitimate voluntary modification request.

conduct an extensive number of engineering analyses rapidly that simply does not appear to exist.^{60/} Moreover, ITF does not address the complex and potentially contentious problems, discussed in detail in Petitioners Comments, associated with developing rules for selecting from among those mutually-exclusive applications that are identified.^{61/} While ITF contemplates that the staff “would select among competing proposals according to the current rules,”^{62/} today there are no rules that govern selection from among mutually-exclusive MDS applications or selection when MDS and ITFS applications are mutually-exclusive. Moreover, the ITFS point system, which has proven effective as a means for awarding new ITFS licenses, was not designed to select from among competing proposals for modifications designed to introduce advanced technologies. Unfortunately, ITF’s approach for expediting ITFS application processing does not do the trick, for it fails to resolve the very staffing and regulatory problems that led to the Petitioners’ approach in the first place.

While CTN advances a variant of the Petitioners’ expedited licensing proposal (suggesting that if an application is unopposed after a 60-day petition to deny period, it should be automatically granted on a conditional basis for a period lasting 180 days after a certification of completion of construction is filed, at which time the grant will become permanent if there are no unresolved

^{60/} Without any analysis of the propensity of periodic filing windows to generate a flood of applications, ITF states in conclusory fashion that “[w]e oppose rolling one-day filing windows as inappropriate for an educational service like ITFS.” ITF Comments, at 9. In fact, the Petitioners believe that for an educational service like ITFS, a rolling, one-day filing window is most appropriate, since it avoids the long intervals between filing windows that delay the inauguration of ITFS services.

^{61/} See Petitioners Comments, at 38-39.

^{62/} ITF Comments, at 9.

complaints of actual interference),^{63/} it objects to the use of the rolling one-day filing window system. Although CTN's embrace of the goal of expediting application processing is a significant step in the right direction, CTN's specific proposals do not go far enough to avoid interminable delays from what even CTN admits will be "an avalanche of paper that could easily overwhelm the Commission's resources."^{64/}

The argument advanced by CTN against adoption of the rolling, one-day filing window system is based on a flawed predicate -- *i.e.* that "the Commission is aware that the one-day filing

^{63/} Given CTN's apparent advocacy for an approach under which any application filed during a window would be conditionally granted automatically upon expiration of a petition to deny period, the Petitioners must admit to some confusion regarding CTN's argument that "staff review of applications for compliance with applicable rules and interference protection requirements is the cornerstone of Title III licensing procedures." CTN Comments, at 34. As the Petitioners discussed in detail in their Comments, their proposal is a more conservative variant of procedures that the Wireless Telecommunications Bureau has been employing for several years in the licensing of facilities in numerous radio services under Title III without detailed interference review of proposed facilities. *See* Petitioners Comments, at 25-27. Indeed, this precedent, coupled with the arguments advanced by counsel for CTN not long ago in support of a proposal that MDS BTA authorization holders be permitted to construct and operate new facilities that could be co-channel or adjacent channel to ITFS facilities without even submitting an application for the specific facility, establishes beyond peradventure that the Commission has ample authority under Title III to implement Petitioners' proposal. *See* Petition of Bell Atlantic Corp. for Reconsideration, MM Docket No. 94-131, at 6-10 (filed Aug. 16, 1995)(proposing licensing system under which BTA authorization holder would be permitted to construct and operate transmission facilities without notifying neighbors or securing prior Commission approval once it had demonstrate to the Commission an awareness of the neighboring facilities it was required to protect)[hereinafter cited as "BA Reconsideration Petition"].

^{64/} *See* CTN Comments, at 31. The Petitioners firmly agree with CTN that the Commission should be taking a less liberal approach to what CTN aptly calls "placeholder" applications — those which propose facilities that will interfere with one or more neighboring facilities, but do not include a necessary consent. *See* CTN Comments, at 34-35. Thus, the Petitioners have previously proposed that the Commission require all applications filed under the expedited licensing system to be "substantially complete" and have defined that phrase to require the inclusion of all necessary consents. *See* Petitioners Comments, at 18-19 n. 36, 44-47.

procedure currently used in MDS can precipitate confusion and litigation.”^{65/} Simply stated, the Petitioners are unaware of any confusion or litigation that has stemmed from the use of the rolling one-day filing window despite the fact that many of the Petitioners are MDS licensees or wireless cable operators that have been operating under that system for years. To the contrary, for the reasons set forth in detail in Petitioners Comments, it has proven to be an extremely fair and effective mechanism for regulating the flow of MDS applications.^{66/} The difference in the backlog of ITFS and MDS applications speaks volumes — one day rolling filing windows are the more effective mechanism for avoiding application backlogs. And, rolling one-day filing windows expedite processing in other ways, discussed in more detail in Petitioners Comments,^{67/} that will not occur under CTN’s proposal for regularly scheduled monthly filing windows.

Finally, the arguments advanced against the Petitioners’ expedited processing approach by the self-styled Alliance of MDS Licensees (“MDS Licensees”), a small collection of MDS lottery winners, are wholly devoid of merit.

At the outset, the MDS Licensees’ opposition appears driven by a paranoia that has no basis in fact. The MDS Licensees apparently believe that wireless cable operators have advanced the provisions of proposed Section 21.913 that allow an MDS channel lessee to file a notification for

^{65/} CTN Comments, at 31.

^{66/} See Petitioners Comments, at 52. Admittedly, whenever an applicant files an application under a rolling one day filing window system, it runs a risk that its proposal will be untimely filed *vis a vis* a proposal submitted previously. Applicants generally prefer such a system anyway, since each knows that so long as its proposal is filed first, it will not be subject to a competing application by someone filing afterwards in the same window.

^{67/} See Petitioners Comments, at 47-52.

a low power booster station as part of a sinister plot to deprive the MDS Licensees of their protected service area rights.^{68/} While much of their argument is difficult to comprehend, it is clear that the MDS Licensees have ignored two simple, but quite important facts. First, the MDS Licensees forget that under the provisions of proposed Section 21.913(a), a lessee can only file a notification for a booster with the consent of the primary station licensee. Thus, the evils that the MDS Licensees fear simply cannot occur. Since no booster can be authorized without the consent of the primary station licensee, the factual underpinning of the MDS Licensees' entire argument is fundamentally flawed.

Second, the MDS Licensees are wrong when they boldly assert that "Booster stations within the protected service area of a licensee are normally licensed only to the licensee of the primary station."^{69/} Surprisingly, the MDS Licensees ignore that under the current provisions of Section 21.913, a lessee of an MDS station can hold the authorization for a high power or a low power booster! The concept of allowing lessees to secure booster authorizations is not one concocted by the Petitioners. Indeed, the Petitioners are proposing to cut down on the circumstances under which a lessee can file a notification for a booster; under the proposed rules, only the licensee of the primary station, and not the lessee, can serve as a licensee of a high power booster. The Petitioners continue to believe, however, that wireless cable operators or other lessees of ITFS channels should be permitted to submit notifications when low power boosters are installed, as is contemplated in the proposed revisions to Sections 21.913 and 74.985. Because such facilities have limited power, are shared by numerous licensees, and must be installed and notification filed rapidly, there is

^{68/} See MDS Licensees Comments, at 13-18, 21.

^{69/} *Id.* at 14.

inadequate time for each of the sharing licensees to submit an individual application. However, because notifications can only be filed by those with a lease or consent agreement with the licensee, the licensee can contractually exercise as much control over the process as it desires and, indeed, can ban the filing of notifications by the lessee.^{70/} Thus, the MDS Licensees will retain absolute control over what low power boosters are and are not authorized for their service areas.

Moreover, the alternative proposed by the MDS Licensees is nothing more than a repackaged version of the rules proposed in the Petition, albeit with several variations that do nothing but promote the ability of individual licensees to prevent the deployment of advanced technologies by their neighbors. Although the MDS Licensees proposal is far from clear, it appears that they are asking the Commission to ban the introduction of all advanced technologies unless all "potentially affected" licensees in a market have agreed to a so-called "master plan."^{71/} As a general proposition, the concept of a regional "master plan" agreed to by all of the licensees in a market that could suffer interference from the deployment of advanced technologies is not troublesome to the Petitioners.^{72/}

^{70/} Not only is the approach supported by the Petitioners, but also by the DL&A ITFS Parties, who have stated that they "do not object to such an approach, so long as it is clear that the operator is not able unilaterally to continue to operate the booster on the ITFS channels in the event that the agreement between the operator and the ITFS licensee expires or terminates." Joint Comments of the Arizona Board of Regents on Behalf of the University of Arizona, *et al.*, RM-9060, at 4 (filed May 14, 1997). Again, under the rules proposed by the *NPRM*, the operator cannot install a low power booster without the express consent of the licensee of each channel that will be used. Thus, the concerns expressed by the DL&A ITFS Parties can be addressed by in the context of the agreement giving that consent.

^{71/} See MDS Licensees Comments, at 5-6.

^{72/} However, the Petitioners believe that the MDS Licensees go too far in seeking to specify the provisions that must be included. For example, the MDS Licensees call for the master plan to include provisions addressing "[h]ow the minimum provision of educational material to students as required by the current rules would be accomplished." MDS Licensees Comments, at 9. That,

To the contrary, the Petitioners have always contemplated that in most cases, the licensees of neighboring stations will consent to the introduction of advanced technologies. As explained in the Petition:

Given the wide variety of system designs and service offerings contemplated for the MDS and ITFS bands, it is impossible to craft a set of technical rules that will result in optimal spectral efficiency in most cases. As a result, the Petitioners contemplate that neighboring licensees will usually negotiate in good faith as required by §§ 21.902(b)(2), 21.938(a) and 74.903(c) of the Rules and enter into private agreements governing the use of their spectrum, and that such private agreements will supersede the Commission's Rules. Thus, in most cases applicants for response station authorizations and new cells will be submitting consents from their neighbors, rather than detailed studies of the potential for interference that would otherwise be required. The proposed rules, in effect, will provide a starting point for negotiations between neighbors, for they will establish what each can do in the absence of the other's consent. Rarely, however, will the proposed rules actually dictate final system designs.^{73/}

However, in crafting the proposed rules, the Petitioners recognized that there are some licensees who do not act in good faith, but instead seek to collect tribute whenever a neighbor requires their consent to a modification. In many respects, the complex technical rules that are the subject of this proceeding serve one purpose and one purpose only -- to allow each licensee the flexibility to implement advanced technologies even when a neighbor unreasonably refuses to consent. As the Petition noted:

Unfortunately, history has shown that despite the requirements of Sections 21.902(b)(2), 21.938(a) and 74.903(c), MDS and ITFS licensees cannot always agree on the design of adjacent systems. . . . [T]he proposed regulatory structure has been

however, is a matter to be determined by each individual ITFS licensee, perhaps in conjunction with the wireless cable operator. The MDS Licensees provide no explanation, and none is imaginable, why the licensee of MDS channels in a market should have any say in the manner by which an ITFS licensee meets its programming obligations.

^{73/} Petition, at 34-35.

designed to give licensees tremendous flexibility in the design of their technologically advanced systems, so that most will be able to provide enhanced service offerings in at least a portion of their service area without requiring consents.^{74/}

The fundamental problem with the MDS Licensees' approach is that they do not identify with any specificity which licensees must be part of a "master plan." Clearly, the MDS Licensees do not contemplate that all licensees in a market must consent, since they concede that "the participating entities could work around the non-participant by developing a coordinated frequency use plan which would not create any interference."^{75/} If the MDS Licensees are saying that only those who would suffer cochannel or adjacent channel interference from the deployment of advanced technologies must consent, then there is no functional difference between the proposals advanced in the *NPRM* (which requires the consent of any licensee that would suffer interference) and the "master plan" approach. However, the Petitioners fear that the MDS Licensees are seeking the ability to veto even advanced technology proposals that would not result in cochannel or adjacent channel interference to their facilities.^{76/} If that is the case, their proposal should be rejected as an unwarranted restriction on the introduction of advanced technologies.

The MDS Licensees' objection to the use of rolling one-day filing windows appears based on the presumption — discredited above — that lessees will somehow inundate the Commission

^{74/} *Id.*, at 35.

^{75/} MDS Licensees Comments, at 12.

^{76/} This fear is based in part on the MDS Licensees reference to CTN's now-discredited November 25th filing concerning the potential for interference due to downconverter overload on channels that are neither cochannel nor adjacent channel to the affected receiver. *See id.*, at 7.

with booster applications designed to “steal” territory from the MDS Licensees.^{77/} For reasons that the MDS Licensees do not explain, they propose the incongruent solution of making the rolling one-day window applicable on a state-by-state basis.^{78/} Quite frankly, the Petitioners cannot envision how one can have a rolling one-day filing window that is open to just one state at a time, and certainly cannot envision how the Commission could craft such an approach in a manner fair to all licensees. The filing of applications for facilities in one state can certainly impact the ability of licensees in the neighboring state to make subsequent modifications (*e.g.*, the modification of an ITFS station in Annandale, VA could certainly preclude a subsequent modification of a cochannel or adjacent channel station in Bethesda, MD). It is difficult to envision how the MDS Licensees’ proposal could be implemented in such a way that licensees in the state where applications are first accepted would not have a substantial leg up over licensees in neighboring states.

In short, while not entirely elegant, the proposals advanced by the Petitioners for expediting application processing represent the best approach to date for avoiding the application processing delays that have historically hampered both the MDS and ITFS. Particularly since the Petitioners are proposing that all licensees have absolute protection against impermissible harmful electrical interference that results from expedited grants, the benefits of the proposed system far outweigh any costs.

^{77/} *See id.* at 22-34.

^{78/} *See id.* at 23 n. 4.

C. Issues Involving ITFS/MDS Relations Should Be Addressed In A Manner That Is Minimally Intrusive, Consistent With The NIA/WCA Joint Proposal.

In their comments, the Petitioners expressed their endorsement of the NIA/WCA Joint Proposal as a reasonable solution to the complex and contentious issues raised in the *NPRM* regarding the continuing role of ITFS as advanced technologies are introduced.^{79/} Although few of the parties submitting comments in response to the *NPRM* had an opportunity to address the NIA/WCA Joint Proposal in detail, as it was not agreed upon until the eleventh hour, the comments do illustrate that NIA and WCA have struck an appropriate balance between assuring that ITFS is used in an appropriate fashion and affording ITFS licensees the flexibility they need to make the best possible use of advanced technologies in conjunction with their wireless cable affiliates.^{80/}

Agreeing with the Petitioners, many of the ITFS representatives participating in this proceeding have expressed concern that an overly-paternalistic regulatory approach could undermine the ability of ITFS licensees to fully deploy advanced technologies. The comments submitted by the P&C ITFS Parties, all of whom are ITFS licensees of long-standing, put it well:

- “Unless the Commission affords the ITFS licensees the needed flexibility to fully exploit digital technology and in delivering two-way communications services, neither the instructional nor commercial benefits of the new technologies will be fully recognized.” P&C ITFS Comments, at 2.

^{79/} See Petitioners Comments, at 14.

^{80/} NIA filed with the Commission not only the NIA/WCA Joint Proposal, but also a document encaptioned “National ITFS Association, Emerging Issues, Adopted by the Board of Directors, 1/6/98.” See NIA Comments. That statement is not a part of the settlement agreement between NIA and WCA and does not necessarily reflect the views of WCA or the Petitioners to the extent that it deviates from the NIA/WCA Joint Proposal. Similarly, WCA is a party to the Petitioners Comments, which do not reflect a settlement with NIA to the extent they depart from the NIA/WCA Joint Proposal.

- “The ITFS licensees and the wireless cable industry will prosper to the maximum extent through a cooperative union. However, over-regulation of the relationship between the two will only straight jacket both resulting in less, rather than more, educational and commercial benefit to the public each strives to serve.” *Id.*
- “Traditional distance education telecourses serve a myriad of local needs which can best be served and in fact can truly only be completely understood by the local educational bodies. Rules designed to apply across the board aimed at achieving a general benefit oftentimes have an opposite effect of restricting and indeed precluding the resolution of locality-specific needs. Excess capacity contractual provisions that provide distance education benefits for a large university system in a major market may be counterproductive for a parochial school system in rural Montana seeking to utilize new technologies. Once again, the maximum benefit to the largest number of participants can only be attained by affording the parties the maximum flexibility possible.” *Id.* at 4.

Similar themes were sounded by a variety of others in the ITFS community.^{81/} Although the NIA/WCA Joint Proposal may be somewhat more regulatory than these parties prefer, the settlement balances in a reasonable manner the desire of ITFS licensees for flexibility against the desire for assurance that all ITFS licensees continue to have fair access to their channel capacity.^{82/}

^{81/} See, e.g., DL&A ITFS Comments, at 14 (“[P]hilosophically, the ITFS Parties believe that they should be free, within certain minimum boundaries relevant to all ITFS licensees, to evaluate their current and future capacity needs and negotiate reservation or recapture provisions consistent with those needs.”); San Francisco/San Jose Consortium Comments, at 6 (“Rather than requiring ITFS licensees to use increased spectrum capacity to provide more instructional programming, the Commission should permit ITFS licensees to work with their excess capacity lessee to maximize the benefits to both the licensee and the lessee. For example, an ITFS licensee should be able to obtain increased financial compensation, Internet Access, equipment and other services rather than increased airtime if those benefits are more in line with the licensee’s educational needs.”); Maryland Comments, at 6 (“the University believes that most of those issues can and should be addressed in the agreements between ITFS licensees and system operators.”).

^{82/} For example, several comments were submitted calling upon the Commission to require that ITFS licensees retain the contractual ability to recapture no less than 25% of the capacity of their channels. See CTN Comments, at 26; ITF Comments, at 11-12. Paragraph I of the NIA/WCA Joint Proposal accomplishes that objective, while Paragraph III affords ITFS licensees the ability to secure compensation for airtime that it elects not to use. Thus, the settlement accommodates the views of long-standing ITFS licensees such as the DL&A ITFS Parties and the ITFS members of the San

Presumably because the NIA/WCA Joint Proposal was not finalized until just prior to the deadline for submitting comments in response to the *NPRM*, a handful of participants have suggested that the Commission mandate provisions in excess capacity leases that go far beyond those contemplated by the NIA/WCA Joint Proposal. In some cases, it appears that those suggestions were advanced by parties aware of the settlement discussions and were intended to be considered merely in the event no settlement was reached.^{83/} In any event, those suggestions should be rejected by the Commission.

First, the NIA/WCA Joint Proposal has been carefully crafted to balance the costs and benefits of mandatory provisions in excess capacity leases. The imposition of additional requirements upon lessees will inevitably disrupt that balance, depriving the parties of the benefit of their bargain. The NIA/WCA Joint Proposal specifically provides that “[b]ecause the following concepts reflect a series of compromises between the parties on matters that are inextricably intertwined, NIA and WCA jointly urge the Commission to adopt them *en toto* without change.” The Petitioners can only reiterate that request, and hope the Commission will appreciate and honor the good faith efforts that NIA and WCA have made to strike a complete compromise with the objective of expediting Commission resolution of the issues raised in the *NPRM* in a manner and with a balance that meets the practical needs of the parties.

Second, and ultimately more importantly, the requested mandatory lease provisions were excluded from the NIA/WCA Joint Proposal for a very good reason — they are unduly intrusive into

Francisco/San Jose Consortium cited in the prior footnote.

^{83/} See *supra* note 6.

the relationship between the ITFS licensee and its lessee and are not necessarily in the best interest of the ITFS community.

CTN and the SW&M ITFS Parties would have the Commission mandate that all excess capacity leases include provisions requiring the lessee either to post a performance bond or set aside money in escrow to assure continued operation of the facilities in the event of insolvency.^{84/} Yet, none of these commenters seems to recognize, much less address, that such a requirement will ultimately reduce the other consideration that can be made available to the ITFS lessor, in effect depriving the ITFS lessor of the ability to bargain for consideration it may find more valuable.

As the Petitioners discussed in some detail in their Comments, leasing offers ITFS licensees an opportunity to secure not only financial support, but also a wealth of new equipment, professional operational and technical support, and the ability to deploy new technologies.^{85/} However, there is only so much that a wireless cable operator can afford to give to its ITFS lessors in exchange for channel capacity, beyond which the wireless cable business is no longer economically viable. In other words, every time the Commission forces a wireless cable operator to provide one type of consideration to an ITFS lessor, it deprives that ITFS lessor of the opportunity to negotiate for some other type of consideration that it perceives to be more valuable. It is for this reason that the

^{84/} See CTN Comments, at 27-29; SW&M Comments, at 8. ITF similarly calls for the payment by the wireless cable operator of security deposits to site lessors so as to assure that the ITFS licensee can continue to operate for three years following expiration, termination, or default of the ITFS lease. See ITF Comments, at 29. However, as discussed *supra* at note 6, it appears that ITF submitted its proposals for consideration only in the event that the NIA and WCA were unable to reach an agreement. See *id.* at 12.

^{85/} See Petitioners Comments, at 134-35.

Petitioners previously have urged the Commission to leave post-relationship matters to contract,^{86/} an approach endorsed by the NIA/WCA Joint Proposal.

The performance bond proposal offers a classic illustration of the problems associated with denying ITFS licensees the freedom of contract. Of course, no ITFS licensee is required to lease excess capacity, and any licensee that believes the risks of leasing outweigh the benefits is free to refrain. Moreover, any ITFS licensee that does lease excess capacity is free to negotiate for a performance bond when it enters into a lease. And, every single ITFS licensee is free to take the monetary consideration it receives from the wireless cable operator and either purchase a performance bond or establish an escrow account. Yet, most ITFS licensees have chosen to do neither, instead devoting their consideration to new programming, equipment, computers and other benefits that will have a more immediate educational impact. Indeed, some ITFS licensees have absolutely no need for a performance bond. For example, despite leasing channel capacity to the Chicago wireless cable operator, Illinois Institute of Technology ("IIT") has retained in full the transmission facilities it was utilizing prior to entering into the leasing arrangement in order to assure that no matter the fate of its lessee, IIT can continue to operate uninterrupted. Should IIT now be required to renegotiate its lease and forego lease payments because the Commission requires the wireless cable operator to secure a performance bond that is of no value to IIT? The answer should be obvious.

CTN has suggested that the Commission require that upon termination of a lease, each ITFS licensee should have the right to purchase all equipment used by its station, whether dedicated to the

^{86/} See *id.* at 150-152.

particular station or shared with other stations.^{87/} The SW&M ITFS Parties may be proposing a similar requirement, although their comments are less clear.^{88/} Such a requirement would be a dramatic change from current Commission policy. As the San Francisco/San Jose Consortium aptly noted, existing Commission policies adopted under *Turner Independent School District*, 8 FCC Rcd 3153 (1993), already provide ITFS licensees with significant safeguards in the event of commercial failure by the excess capacity lessee.^{89/} While, that requirement is of dubious benefit to many ITFS licensees,^{90/} at least the Commission has recognized that it cannot require wireless cable operators to do the impossible — if multiple licensees are all sharing a piece of equipment, the wireless cable operator cannot give each one of those licensees the right to purchase it. Thus, the Commission has consistently approved excess capacity leases that exempt shared equipment from purchase options. Of course, if the MDS and ITFS licensees in a market desire to acquire the existing common equipment upon termination of their relationship with the wireless cable operator (and, again, there are a variety of reasons why they may not want to do so),^{91/} they can negotiate for the right to jointly acquire continued access to the common equipment. But to do so requires those MDS and ITFS

^{87/} See CTN Comments, at 29.

^{88/} See SW&M ITFS Comments, at 8. Although it appears, as noted *supra* at note 6, that ITF does not intend for its proposals to be considered in light of the ability of WCA and NIA to reach a consensus, ITF goes even a step further, asking the Commission to mandate that “[e]ssential digital transmitting and receiving equipment must be transferred to the ITFS licensee at the commencement of a lease term.” ITF Comments, at 29. Like its ITFS brethren, however, ITF appears oblivious to the impact that such a requirement will have on the ability of ITFS licensees to secure other, more valuable consideration in negotiating contracts.

^{89/} See San Francisco/San Jose Consortium Comments, at 16.

^{90/} See Petitioners Comments, at 152 n. 249.

^{91/} See *id.*

licensees to agree among themselves how to allocate the significant costs and the benefits of having joint access to common equipment. The Commission is hardly the appropriate body to dictate whether an ITFS licensee must forego more valuable consideration in exchange for access to common equipment, much less determine how various licensees with access to the common equipment should share the costs and benefits.

Similarly, the Commission should reject ITF's proposal that ITFS licensees be required to have independent consultants certify that consents to interference "would not be harmful to future instructional service."^{92/} Although the Petitioners have largely refuted this proposal in their Comments,^{93/} it is worth noting that ITF concedes that "ITF has not experienced an instance in which any party has coerced us to submit an ill-advised interference consent."^{94/} Indeed, while a handful of commenters offer hearsay that coercion of interference consents is a problem,^{95/} *not one instance of coercion has been documented!* Since the myth of coerced consents has now been clearly discredited as nothing more than a figment of over-paranoid imaginations, the Commission should return to its policy of trusting ITFS licensees to only grant consents when appropriate.^{96/}

^{92/} ITF Comments, at 23-24.

^{93/} See Petitioners Comments, at 161-2.

^{94/} ITF Comments at 24 n. 29.

^{95/} See SW&M Comments, at 7.

^{96/} The Dallas Commenters argue that "the Commission should establish a minimum service threshold below which ITFS licensees may not descend in considering whether to consent to interference." Dallas Comments, at 6 n. 4. While the Petitioners do not object to such a requirement in concept, two points must be made. First, as the Petitioners discussed in detail in their Comments, where an ITFS licensee grants a consent that results in undue interference, the appropriate Commission response is to question whether that licensee should continue to hold an authorization, not to delay the grant of the recipient of the consent. See Petitioners Comments, at 33-34 n.63.

D. The Commission Should Reject Efforts By Licensees To Escape Their Lease Obligations.

Perhaps inevitably, a small minority of the licensees filing comments in response to the *NPRM* view this proceeding as an opportunity to reopen lease negotiations with wireless cable operators, notwithstanding the fact that they are subject to valid binding leases. For some time now, excess capacity leases have often been crafted with an eye to the day when digital technology will permit the introduction of advanced technologies. In such cases, lease consideration has been established to compensate the licensee for the use of its channels for such advanced technologies.^{27/} Perhaps unhappy with their agreements, a few lessors now are urging the Commission, in effect, to void those agreements and require a renegotiation before digital technology can be implemented. Those efforts, which merely promote private gain, should be categorically rejected by the Commission.

Second, and more importantly, it would be extremely difficult to develop a bright-line test that would be appropriate. For example, the Petitioners suspect that no one would be troubled were an ITFS licensee to consent to a 44 dB cochannel D/U ratio at all of its receive sites – it is generally agreed that the 1 dB shortfall from the 45 dB requirement would not be material. However, what if the ITFS licensee consents to 35 dB? Although the Commission has not yet addressed permanent D/U ratios for digital operations, it is possible that an ITFS licensee operating digitally could accept a 35 dB co-channel D/U without any adverse impact. What if the licensee accepts a 20 dB co-channel ratio (which clearly results in interference) at 1% of its receive sites in order to permit a neighboring school board to launch a new service to hundreds of receive sites. What if 10% of its receive sites are affected? What if those 10% only suffer slight interference? These are all difficult issues, making the development of a bright-line test difficult. Certainly, after grappling with this issue, the Petitioners appreciate why the Dallas Commenters have not proposed a solution themselves.

^{27/} In some cases, a separate lease rate is set forth to be used if digital technology is deployed, while other leases employ a blended lease rate for use regardless of how the channels are deployed.

Not content with their current enviable position as lessors with no significant risk should wireless cable fail,^{98/} the MDS Licensees now advance a plan to leverage their position by assuring that no wireless cable operator can deploy advanced technologies without paying additional tribute to licensees. They do so through the transparent ploy of urging the Commission to free licensees from leases they have already entered into under which the lessee is contractually entitled to have the lessor deploy advanced technologies.^{99/}

The fundamental flaw in the MDS Licensees' position is that it requires the Commission to presume that the ability to deploy advanced digital technology "[was] never contemplated at the time the leases were signed."^{100/} However, the Commission cannot fairly make that presumption; even a cursory review of the Commission's files discloses that many of today's leases specifically contemplate the use of digital technology and/or the provision of non-video services. Where an MDS Licensee or any other licensee has committed to make its channels available for the deployment of advanced technologies, the Commission should not intercede. The binding nature of contracts is, and should remain, a matter of state law.^{101/}

^{98/} The MDS Licensees generally secured their authorizations through lottery and held their spectrum until a wireless cable operator was willing to construct their facilities and utilize their channel capacity. Ironically, while wireless cable operators are losing substantial sums of money due to the high capital costs of developing systems, the MDS Licensees and their brethren are the only profitable entities in the industry, for they collect their lease fees regardless of whether the wireless cable operator succeeds.

^{99/} See MDS Licensee Comments at 6, 26-27.

^{100/} *Id.* at 27.

^{101/} Hispanic Information & Telecommunications Network ("HITN") contends along similar lines that "[u]nless specifically contemplated in the lease agreement, in no case should the Commission permit MDS operators currently using ITFS lease agreements to utilize ITFS spectrum for any use other than one-way wireless cable video programming services." HITN Comments, at

For similar reasons, notwithstanding the entreaties of a handful of ITFS representatives, the Commission should adopt the element of the NIA/WCA Joint Proposal which provides that excess capacity lease agreements that provide for digital usage and were entered into prior to the release of final rules in this proceeding should be grandfathered from complying with any rule changes adopted here. Although this provision is a critical component of the NIA/WCA Joint Proposal, the SW&M ITFS Parties would have the Commission mandate that all ITFS excess capacity leases be amended after the conclusion of this proceeding “to make clear that the wireless cable lessee and the ITFS licensee have together considered the rules changes adopted and made any appropriate changes to lease terms . . .”^{102/} Such an approach is both unnecessary and unfair to lessees.

As the Petitioners detailed in their Comments in response to the *NPRM*, there are some agreements in existence that contemplated the use of spectrum for return paths, and many that provide mechanisms for the introduction of digitization, antenna sectorization and/or cellularization.^{103/} In these cases, the parties have already fixed — and in many cases the lessee has already paid some of — the appropriate consideration due each party as a result of their respective costs and benefits from a conversion to advanced technologies. The Petitioners have established that

9. Once again, the rights of the lessee under an excess capacity lease are a matter of state contract law and are not the appropriate topic for a rulemaking proceeding.

^{102/} SW&M Comments, at 8-9. Along similar lines, CTN summarily espouses that “the Commission should adopt a policy that requires excess capacity lease agreements to be consistent with current rules rather than the rules in effect when the lease took effect.” CTN Comments, at 30. Yet, CTN makes no effort to even explain how the public interest is advanced by depriving the parties to an existing agreement the benefit of their bargains, particularly where ITFS licensees may be required to return substantial consideration that had been paid by lessees in anticipation of future benefits.

^{103/} See Petitioners Comments, at 162-63.

were the Commission to mandate renegotiation of lease agreements, fundamental fairness dictates that the Commission also mandate that ITFS licensees return to the lessee consideration they have received in exchange for anticipated future benefits. As the Petitioners have already demonstrated:

The parties, and not the Commission, are best positioned to determine whether proposed system changes require contract revisions. Since no ITFS facility can be modified without the execution by the licensee of an appropriate application form, every ITFS licensee will have an opportunity to consider its contractual rights and obligations before technical changes are implemented, and can insist upon an amendment if necessary.^{104/}

Thus, the Petitioners whole-heartedly agree with BellSouth Corp. that requiring the amendment of existing contracts to conform to whatever rules are adopted here “[n]ot only is . . . unduly burdensome, unnecessary and contrary to precedent but it would also unfairly and unnecessarily disrupt existing business relationships and operations and deprive parties of their carefully negotiated benefits of those agreements.”^{105/}

Finally, the MDS Licensees’ proposal that the Commission define the phrase “channel” for use in interpreting all existing contracts is patently absurd.^{106/} The MDS Licensees are proposing a definition that is so limiting that it would likely deprive most wireless cable operators of the benefit of their bargains with the MDS Licensees and other lessors. But of course, that is the MDS Licensees objective -- to position themselves to renegotiate binding agreements that are now in place. Suffice it to say that the appropriate interpretation of that word “channel” will depend upon the particular agreement and the intent of the parties to that agreement. Interpreting contracts is a

^{104/} *Id.* at 163.

^{105/} BellSouth Comments, at 12. *See also* P&C ITFS Comments, at 6.

^{106/} *See* MDS Licensee Comments, at 26-27.